No. 85-156

Office-Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1985

THOMAS B. HOOVER, VIOLET J. BYERLY, D. GARRETT SPEAR, JAMES DiGIOVANNANTONIO, ELIZABETH R. KEENAN, RICHARD C. ARPIN, DUANE R. CARTER, LEE E. VERZINSKIE, Individually and as representatives of the class described herein,

Petitioners,

vs.

ELIZABETH HANFORD DOLE, Secretary, Department of Transportation, NORFOLK SOUTHERN CORPORATION and CONSOLIDATED RAIL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT CREATED UNDER THE RAILROAD REORGANIZATION ACT OF 1973

LAWRENCE GOLDBERG
PAUL SHALITA
GOLDBERG, DICKMAN, SHALITA & TABAS, P.C.
Attorneys for Petitioners
230 South 15th Street
5th Floor
Philadelphia, Pennsylvania 19102
(215) 985-0800

app

QUESTIONS PRESENTED FOR REVIEW

(1) Whether or not the Secretary of Transportation exceeded her statutory authority in negotiating that for which she had no authority to negotiate, i.e., the sale and transfer of the ESOP held stock.

(2) Whether or not the ESOP beneficiaries are entitled to independent representation under circumstances where the statutory mechanism for directing the affairs of the ESOP clearly indicates the existence of a conflict of interest.

(3) If the Secretary's plan (to sell Conrail to Norfolk

Southern Corporation) is implemented, whether or not the ESOP beneficiaries have claims against the United States to the extent that they are under compensated.

LIST OF ALL PARTIES TO THE PROCEEDING

All parties are named in the caption.

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of all Parties to the Proceeding ii

Table of Contents iii

Table of Citations iv

Reports of Opinions 2

Statement of Jurisdiction 3

Statutory Provisions Involved in the Case 4

Statement of the Case 5

The Factual Background 5

Formation of ESOP 8

Administration of the ESOP 11

Vesting Provisions of the ESOP 12

The Sale of Conrail Stock Owned by the United States 13

The Offer of Norfolk Southern Corporation 16

Compensation for the Taking Is Constitutionally Mandated 18

Contents

Page

The Status of ESOP Representation 19

Reasons for Granting the Writ:

I. The lower court erred in deciding on the merits that the Secretary did not exceed her statutory authority in negotiating the sale of that for which she had no authority to negotiate, i.e., the sale and transfer of the ESOP held stock. 22

II. That the ESOP beneficiaries will have a claim for compensation if the Secretary's program is implemented is a presently justiciable issue. 27

III. The ESOP beneficiaries are entitled to independent representation. 34

Conclusion 46

TABLE OF CITATIONS

Cases Cited:

Dames & Moore v. Regan, 453 U.S. 654, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981) 27, 28, 29, 30, 31, 32, 33

Kaufman v. Society Internationale, 343 U.S. 156 (1952) 43, 44, 45

Perry v. Commerce Loan Co., 383 U.S. 392, 86 S. Ct. 852, 15 L. Ed. 2d 827 (1966) 39

Rector of Holy Trinity Church v. United States, 143 U.S. 457, 12 S. Ct. 511, 36 L. Ed 226 (1892) 37, 38, 39

Contents

Page

Regional Rail Reorganization Act Cases, 419 U.S. 102, 42 L. Ed. 2d 320, 95 S. Ct. 335 (1974) 30, 31, 33

United States v. Mendoza, 565 F. 2d 1285 (5th Cir. 1978), modified and affirmed, 581 F. 2d 88 (1978) 37, 39

Statutes Cited:

45 U.S.C. § 701(a) 4, 5

45 U.S.C. § 711(a) 4, 7

45 U.S.C. § 719(e)(3) 3

45 U.S.C. § 726(f) 4, 8, 34

45 U.S.C. § 741(a) 4, 7

45 U.S.C. § 761(a) 4

45 U.S.C. § 763 14

45 U.S.C. § 1101 *et seq.* 13

45 U.S.C. § 1105(b) 3

APPENDIX

Page

Opinion and Order of the Special Court 1a

Verbatim Transcripts of Statutory Provisions Referred to Herein — Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701 *et seq.*:

§ 101(a), 45 U.S.C. § 701(a) Statement of Policy 23a

§ 201(a), 45 U.S.C. § 711(a) Authority for Formation of USRA 24a

§ 301(a), 45 U.S.C. § 741(a) Authority for Formation of Conrail 26a

§ 216(f), 45 U.S.C. § 726(f) Directive to Form ESOP 29a

§ 40a(a), 45 U.S.C. § 761(a) Directive to Sell Interests of the United States 34a

IN THE
SUPREME COURT OF THE UNITED STATES
NO.

THOMAS B. HOOVER

VIOLET J. BYERLY

D. GARRETT SPEAR

JAMES DiGIOVANNANTONIO

ELIZABETH R. KEENAN

RICHARD C. ARPIN

DUANE R. CARTER

LEE E. VERZINSKIE
Individually and as representatives of the class described herein

v.

ELIZABETH HANFORD DOLE
Secretary
Department of Transportation

And

NORFOLK SOUTHERN CORPORATION

And

CONSOLIDATED RAIL CORPORATION

PETITION FOR CERTIORARI

TO THE HONORABLE, THE JUSTICES OF THE SAID COURT:

The Plaintiffs herein, by their undersigned attorneys, respectfully petition

your Honorable Court to issue a Writ of Certiorari to the Special Court established under the Regional Rail Reorganization Act of 1973.

REPORTS OF OPINIONS

There are no reports of opinions delivered in this case except the Memorandum - Order filed on July 9, 1985 by the Special Court formed under the Regional Rail Reorganization Act of 1973. This opinion has not, as yet, been printed in the Federal Reporter.

STATEMENT OF JURISDICTION

(i) The judgment sought to be reviewed was entered July 9, 1985.

(ii) There are no proceedings respecting a rehearing in this case.

(iii) No Cross Petition for Writ of Certiorari has been filed.

(iv) Jurisdiction is conferred on the Supreme Court to review the judgment by writ of certiorari by §209(e)(3) of the Regional Rail Reorganization Act of 1973, 45 U.S.C. §719(e)(3), and/or by §1152(b) of the Northeast Rail Service Act of 1981, 45 U.S.C. §1105(b).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

The statutory provisions involved in this case are as follows:

Section 101(a) of the Railroad Regionalization Act of 1973, 45 U.S.C. §701(a)
Statement of Policy - Printed verbatim in Appendix 23a

Section 201(a) of the Railroad Regionalization Act of 1973, 45 U.S.C. §711(a)
Authority for Formation of USRA - Printed verbatim in Appendix 24a

Section 301(a) of the Railroad Regionalization Act of 1973, 45 U.S.C. §741(a)
Authority for Formation of Conrail - Printed verbatim in Appendix 25a

Section 216(f) of the Railroad Regionalization Act of 1973, 45 U.S.C. §726(f)
Authority to Invest Additional Funds in Conrail - Provisions for Formation of ESOP
Added by Amendment 1978 - Printed verbatim in Appendix 26a

Section 401(a) of the Railroad Regionalization Act of 1973, 45 U.S.C. §761(a)
Directive to the Secretary to Sell the Interest of the United States in Conrail Under Certain Conditions
Added by Amendment 1981 - Printed verbatim in Appendix 27a

STATEMENT OF THE CASE

THE FACTUAL BACKGROUND

Prior to 1973, by reason of the bankruptcy of the Penn Central Railroad and other railroads serving the Northeastern quadrant of the United States, the stability of the rail system and indeed of the entire public transportation system in that area of the United States became unstable and in jeopardy of total collapse.

By reason of this situation, and in an attempt to alieviate and to place in motion a mechanism for restoring stability, the Congress of the United States enacted the Three R Act.

In Section 101(a), of the Three R Act (45 U.S.C §701(a), the Congress made the following findings:

> (1) Essential rail service in the Midwest and northeast region of the United States is provided by railroads which are today insolvent and attempting to undergo reorganization under the Bankruptcy Act;

(2) This essential rail service is threatened with cessation or significant curtailment because of the inability of the trustees of such railroads to formulate acceptable plans of reorganization. This rail service is operated over rail properties which were acquired for a public use, but which have been permitted to deteriorate and now acquire extensive rehabilitation and modernization;

(3) The public convenience and necessity require adequate and efficient rail service in this region and throughout the Nation to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, States and their political subdivisions, and consumers;

(4) Continuation and improvement of essential rail service in this region is also necessary to preserve and maintain adequate national rail services and an efficient national rail transportation system;

(5) Rail service and rail transportation offer economic and environmental advantages with respect to land use, air pollution, noise levels, energy efficiency and conservation, resource allocation,

safety, and cost per ton mile of movement to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest;

(6) These needs cannot be met without substantial action by the Federal Government.

In response to the declared necessity for "substantial action by the Federal Government", the Congress:

(1) established the United States Railway Association (USRA), an incorporated nonprofit association formed as a government corporation under the laws of the District of Columbia, pursuant to authority granted in §201(a) of the Three R Act 45 U.S.C. §711(a), as a mechanism, inter alia, for providing federal funds to the project (i.e., the preservation of rail service in the Midwest and Northeast parts of the United States);

(2) directed in §301(a) of the Three R Act 45 U.S.C. §741(a), the incorporation under a state law of Conrail to establish an entity to receive from the various trustees in bankruptcy the rail properties of the former operating railroads, and thereafter to own and through operations of those properties to provide the necessary rail services;

(3) appropriated funds necessary for the project.

Thereafter, Conrail was duly formed and capitalized. The requisite rail properties were transferred to it, and the corporation commenced operations.

FORMATION OF ESOP

By 1978, while a certain amount of progress had been made, Conrail's operations were still unprofitable and additional infusions of capital from the Federal Government became an obvious necessity. At that time, the Congress enacted the United States Railway Association Amendments Act of 1978, Act Nov. 1, 1978 P.L. 95-566, 92 Stat 2397, which added §216(f) (45 U.S.C. §726(f)) to the original Three R Act. Up to that point, USRA had invested $1.1 billion in Conrail Series A preferred stock. Under the 1978 amendment, additional capital contributions were authorized up to $1.2 billion (making $2.3 billion in the

aggregate), but in order to encourage the enthusiastic joinder of employees in the salvage effort, the last $345,000,000 of the authorized additional investment was conditioned upon the adoption of an Employee Stock Ownership Plan (ESOP), having certain statutorally mandated attributes as follows:

(i) transfer to the plan and allocation to the accounts of plan participants, in periodic installments, of Series A preferred stock of Conrail with a stated redemption value of at least $345,000,000, or other securities constituting a meaningful interest in that corporation. This $345,000,000 represented 15% of the aggregate $2.3 billion which USRA invested in Conrail Series A preferred stock.

(ii) immediate vesting of the rights of the participants upon allocation, subject to defeasance only if the profitability objectives of the Act were not achieved.

The ESOP was duly established. In funding the ESOP, there was established a subsidiary of Conrail known as Conrail

Equity Corporation (CEC). Conrail issued to CEC 4,411,760 shares of its common stock - representing 15% of the amount outstanding, and received back an equal number of shares of CEC's preferred, which was made available for transfer to the ESOP. The CEC preferred was made "redeemable" by an exchange of common stock of Conrail on a one for one basis (subject to adjustments). This exchange ratio maintained a 15% interest in Conrail common, which, by hypothesis, represented a government investment of $345,000,000.

The ESOP, as established, provided that for each of the plan years beginning with 1980, Conrail's contribution to the ESOP trust was to be 441,176 shares of the CEC preferred stock (10% of the total), so that after the passage of 10 years, the full 4,411,760 shares of CEC preferred would be held by the ESOP. Upon eventual conversion, the ESOP would thus have

4,411,760 common shares of Conrail (representing 15% of the total) for distribution to the employee participants.

ADMINISTRATION OF THE ESOP

Under the terms of the ESOP, the plan is administered by a committee, comprised of not less than three persons nor more than five persons, all of whom are appointed by the Chief Executive Officer of Conrail.

The assets of the plan are held under a trust agreement between Conrail and the Philadelphia National Bank as trustee, but under this agreement, the trustee has no discretion whatsoever with respect to management of the assets; i.e., the voting of securities held in the trust. The trustee is required to vote in accordance with directions delivered by the committee. Accordingly, effective management discretion is vested solely with the committee, and not with the trustee.

VESTING PROVISIONS OF THE ESOP

In accordance with the Three R Act, as amended, the Conrail securities contributed to the ESOP were subject to defeasance unless Conrail was able to meet two "bench mark tests" established under the Act, but once those tests were met, those shares became completely vested; i.e., no longer subject to defeasance for any reason whatsoever.

The two "bench mark tests", as established by Congress were as follows:

(i) a financial test, requiring that Conrail attain "positive net income" as defined, for two consecutive calendar quarters during the ten year period ending December 31, 1990;

(ii) an operational test, intended to measure, inter alia, the relative productivity of Conrail's employees. This test required that Conrail attain, for two consecutive calendar quarters, a freight labor cost to freight revenue ratio at least equal to the average of such ratio as attained by all class I railroads in 1977.

Conrail successfully met these requirements in the fourth quarter of 1982 and the first quarter of 1983. The Secretary of Transportation was duly informed by letter dated April 21, 1983 from L. Stanley Crane, Chairman and Chief Executive Officer of Conrail, that the tests were met, and that the employees' ESOP rights were vested.

THE SALE OF CONRAIL STOCK OWNED BY THE UNITED STATES

In 1981, the Congress adopted the Northeast Rail Service Act of 1981, P.L. 97-35, 95 Stat 654, 45 U.S.C. §1101 et seq. (NERSA). In this Act, Congress established the stated purpose to remove by a date certain the Government's obligation to subsidize freight operations and to provide for orderly return of freight service to the private sector. In a companion amendment to the Three R Act, (§401(a), 45 U.S.C. §761(a)), the Congress established a

mechanism for the sale of the interest of the United States in Conrail. Under this section, the Secretary of Transportation was directed to engage the services of an investment banker to "arrange for the sale of the interest of the United States in the common stock of the corporation under this section". (emphasis supplied)

In order to implement the process of effecting a sale, Congress directed the Board of Directors of USRA to make a determination as to whether Conrail would be a profitable carrier, as defined in the Act. See §403, 45 U.S.C. §763. If that determination were positive, the Secretary was directed to continue her efforts to sell the interest of the United States in the common stock of Conrail. If the determination were negative, the Secretary was directed to initiate discussions for transfer of the properties pursuant to other designated legislation. However, in this initial determination of profitability

on June 1, 1983, the USRA Board made a positive finding.

The Congress further directed that a second determination of profitability be made of actual rather than potential profitability, applied to the period June 1, 1983 through October 31, 1983. Again, if the determination were positive, the Secretary was directed to continue efforts to sell the interest of the United States, and if it were negative, to initiate a plan for transfer of the railroad properties in such manner that vital services would continue. The determination as made pursuant to this requirement was also positive.

Accordingly, the Secretary continued her efforts to sell the interest of the United States in Conrail stock.

In soliciting proposals for the sale of the interest of the United States, the Secretary developed at least four pro-

positions for the purchase of such stock; i.e., proposals from the Marriot group, Alleghany Corporation, Norfolk Southern Corporation all of which proposed to own and operate the Conrail properties, and Morgan Stanley & Company, Inc., which proposed to make a public offering of its securities.

THE OFFER OF NORFOLK SOUTHERN CORPORATION

The proposal of the Norfolk Southern Corporation requires, as a condition of closing, the liquidation of the stock interest of the ESOP, and the concomitant acquisition of 100% stock interest by the purchaser.

Under the applicable legislation, and pursuant to the express direction of Congress, the Secretary's authority is limited to the sale of the interest of the United States; i.e., she has no authority whatsoever to negotiate or to contract for the sale of the stock interest of the ESOP.

Notwithstanding this lack of authority, and in direct violation of the statutory directive controlling her activity, the Secretary proceeded to negotiate with Norfolk Southern for the sale of the ESOP stock. These negotiations culminated when the Norfolk Southern and the Secretary executed a memorandum of intent. Under the provisions of the memorandum of intent, the ESOP stock will be acquired at a value to be determined in some unstated fashion. Norfolk Southern agrees to provide $375,000,000 in its own stock or in cash (at its own discretion), a part of which will be used to purchase the interest of the ESOP, and a part of which will be used to satisfy other obligations to employees also arising by reason of statutory mandate; i.e., employee claims arising out of receipt of less than standard wages, and rights and options of employees to acquire additional Conrail stock. The memorandum

of intent does not attempt to allocate the fixed sum of $375,000,000 among the various claims and interests. It is contemplated under the memorandum of intent that Norfolk Southern would be allowed to use up to $300,000,000 of Conrail's cash to settle all employee claims, leaving the remaining $75,000,000 as the deduced value of the ESOP held shares. Such a valuation equates to approximately $17 per share for the ESOP held shares, whereas the value of the Government's shares under the memorandum of intent is set at no less than $48 per share, an obvious inequity. If imposed involuntarily, this transaction would be confiscatory. Furthermore, because the sum is not allocated among the various competing claims, the effect of that proposal is to create unwanted conflicts among various classes of employees.

COMPENSATION FOR THE TAKING IS CONSTITUTIONALLY MANDATED

The Secretary's effort to impose the transfer of the ESOP held shares

constitutes an improper and unconstitutional taking of private property, and if the Secretary's valuation is upheld, that in itself constitutes a taking without fair and adequate compensation, all in violation of the Fifth Amendment of the Constitution of the United States.

THE STATUS OF ESOP REPRESENTATION

As beneficiaries of the ESOP which holds Conrail stock no longer subject to defeasance, the employees have an independent and vested stock interest in Conrail.

Under existing circumstances, the only person authorized to speak for or represent that interest is the committee appointed by the Chairman of Conrail and even this committee cannot act with respect to certain discretionary matters without the concurrence of USRA or the Secretary of Transportation.

The ESOP has never had proper representation. The trustee of the plan is given administrative duties only, and all

discretionary voice is vested with Conrail's Board of Directors and an administrative committee appointed by the Chairman of Conrail. Conrail's 11 outside directors are appointed by USRA (6 appointees), and by the Department of Transportation (5 appointees). The Chairman and President of Conrail are elected by the Board. Furthermore, all of those persons are given immunity from liability which might otherwise arise from following the instructions of the Secretary or USRA. Thus, the mechanism established provides no opportunity for independent trusteeship to represent the interests of the ESOP and its participants, and immunizes those persons controlling the ESOP from responsibility for their actions.

In implementing the statutory directive to sell the interest of the United States in Conrail, the Secretary has exceeded her authority by negotiating for

and entering into a memorandum of intent to sell not only the interest of the United States, but also the interest of the ESOP, all without regard to

(i) the question of whether it is in the best interest of the ESOP participants to sell their interest, or at what price; and

(ii) the particular circumstances (i.e., the involuntary nature of the transfer) which amount to a deprivation of property without due process of law.

REASONS FOR GRANTING THE WRIT

Petitioners believe that the Special Court has decided important questions of Federal Law in a manner which conflict with applicable decisions of the Supreme Court, and in support thereof assert the following argument.

The Special Court held that one of the three issues presented by the Petitioners was not ripe for decision, and decided the other two issues on the merits against the Petitioners.

The three issues presented to and decided by the Court, and the reasons why Petitioners believe those conclusions are erroneous are as follows:

I. THE LOWER COURT ERRED IN DECIDING ON THE MERITS THAT THE SECRETARY DID NOT EXCEED HER STATUTORY AUTHORITY IN NEGOTIATING THE SALE OF THAT FOR WHICH SHE HAD NO AUTHORITY/TO NEGOTIATE, i.e., THE SALE AND TRANSFER OF THE ESOP HELD STOCK

Under the applicable legislation, and pursuant to the express direction

of Congress, the Secretary's authority is limited to the sale of the interest of the United States; i.e., she has no authority whatsoever to negotiate or to contract for the sale of the stock interest of the ESOP.

The fact is, however, she has also negotiated for the sale of the stock held by the ESOP.

The memorandum of intent reflects the Government's intent to sell its own 85% interest at a price. The memorandum of intent further reflects the condition that Norfolk Southern must acquire 100% of the stock. It follows that under the memorandum of intent, Norfolk Southern will acquire and pay to the ESOP beneficiaries whatever consideration is established for the ESOP held stock. There can be no question that the Secretary has been negotiating for the sale of the stock on behalf of the ESOP.

The Special Court offered the

following (Opinion, page 9; Appendix page 15a::

> "(t)he Secretary has merely: a) made a commitment to sell the Government's interest if 'appropriate arrangements' are made with regard to the ESOP and Congress expressly authorizes the proposed sale to Norfolk Southern; and b) recommended that Congress enact legislation to provide for the sale."

as an explanation for its conclusion that

> "the record leaves no room for a genuine dispute as to the limited role that Secretary Dole has played to date with regard to the ESOP stock....[t]he [memorandum of intent] does not purport to sell the ESOP's interest or require conveyance of that interest at any price."

The Special Court reasoned that Congress gave the Secretary the broadest authority to devise a plan to sell the interest of the United States in Conrail. The Court accepted the proposition that this broad brush authority included the right, within the Secretary's discretion, also to negotiate for the sale of the ESOP stock, so long as consummation

of the sale was appropriately conditioned, while at the same time, treating the Secretary's activities as a "limited role". In actuality, the Secretary's role is anything but limited, the effect of her activity on the ESOP beneficiaries is disastrous, and in the process, she is acting contrary to a stated policy of Congress.

What the Court failed to recognize or to consider is that Congress had previously given to the ESOP beneficiaries a vested interest in their Conrail stock. By definition, a vested interest cannot be divested except by voluntary sale or by condemnation. Furthermore, the purpose that Congress expressed when it gave the stock to the ESOP beneficiaries is that the carrying out of the transportation policy of the United States, was to be served by giving to Conrail's employees an

economic incentive by way of stock ownership in their employer.

By including the ESOP stock in the negotiations, the Secretary has in effect expressed an intention to override the stated policy of the Congress. Thus, the Secretary has clearly entered upon the process of negotiating not only for something which she has no power to deliver, but the culmination of which would contravene a stated Congressional purpose.

The direct focus of your Petitioners' argument centers upon the question of whether the executive has the power to act in violation of present statutory authority, to execute and deliver a memorandum of intent to consummate a transaction which is illegal under present law, subject to the condition that it be made legal by subsequent statutory authority. This intriguing question was by-passed

completely by the Special Court's opinion which held as a matter of interpretation simply that the Secretary did not exceed her statutory authority, without any consideration of the fact that the Court had before it for comparison two statutory provisions and two separate statutory purposes.

II. THAT THE ESOP BENEFICIARIES WILL HAVE A CLAIM FOR COMPENSATION IF THE SECRETARY'S PROGRAM IS IMPLEMENTED IS A PRESENTLY JUSTICIABLE ISSUE

The present situation is precisely analagous to that in Dames & Moore v. Regan, 453 U.S. 654, 69 L.Ed.2d 918 101 S.Ct. 2972 (1981). After the American Embassy in Iran was captured and while the hostages were still in custody, a creditor brought suit in an American court attaching assets of an Iranian national. By Executive Order, the assets were frozen; i.e., transfer was forbidden. After the settlement was negotiated with Iran, the

President issued an Executive Order maintaining the suspension until such time as the Claims Tribunal acted. If the Claims Tribunal decided it had no jurisdiction over those particular assets, the suspension would terminate, otherwise the assets would be disposed of free of the complainant's lien and in accordance with the decision of the Claims Tribunal. The potential divestiture affected American assets, for the benefit of a foreign government, but for a purpose supportive of the public interest. In the present case, the potential divestiture is of privately held assets, to a privately held profit making corporation. In both cases, there exists uncertainty as to whether the divestiture of assets would occur; in Dames, because the Claims Tribunal established to handle the situation had not yet ruled, and in the present case because the Congress has not yet enacted the necessary implementing legislation.

The complainant brought suit in federal court against the Government of the United States and the Secretary of Treasury for the purpose of voiding that Executive Order. There was no assurance that the property on which the complainant held a lien would be transferred. That was totally dependent on the decision of the claims tribunal, just as in the present case, the transfer of the ESOP stock cannot be accomplished until the Congress has enacted enabling legislation. Against the charge that there was no issue ripe for adjudication, your Honorable Court held 453 U.S. at 689:

> "...the possibility that the President's actions may effect a taking of petitioner's property, make[s] ripe for adjudication the question whether petitioner will have a remedy at law in the Court of Claims under the Tucker Act, 28 U.S.C. §1491 (1976 Ed., Supp. III), in such event. That the fact and extent of the taking in this case is yet speculative is inconsequential..."

This quotation represents a direct holding that the right to compensation is justiciable even in a situation where the eventuality of harm to the complainant is not assured. A similar situation exists in the present case, which presents an exact analogy. The complaint in this case seeks a decision on the very same issue; i.e., if the ESOP stock is involuntarily taken, do the ESOP beneficiaries have Tucker Act claims. On the authority of Dames, that issue is clearly justiciable.

In Regional Rail Reorganization Act cases, 419 U.S. 102, 42 L.Ed.2d 320, 95 S.Ct. 335 (1974), the implementation of the Three R Act required that the railroads continue to operate pending implementation of the Final System Plan, even though such continued operation might accelerate erosion of the interests of the plaintiffs. It was an admitted fact

that the Final System Plan was unlikely to be implemented within a reasonable period of time. Whether there would be substantial erosion of value was one of those "hypothetical" issues not subject to precise measurement, and the date and nature of the implementation of the Final System Plan was unknown. Nevertheless, the Court concluded that it should decide whether or not a Tucker Act claim would be available if it turned out that there was system erosion when the Final System Plan was eventually implemented. Again, the fact that the issue would not arise at all unless certain future events occurred did not prevent the controversy from being justiciable. Your Honorable Court concluded that it must presently "determine if the Tucker Act is available." 419 U.S. at 102.

The Special Court distinguished Dames from the present case on the basis that in Dames, the President had

issued an Executive Order suspending the claimant's claim whereas in the instant case, Secretary Dole had signed only a non-self executing memorandum of intent.

This is a classic case of a Court's finding a distinction without a difference. In Dames, it was not the validity of the Presidential Order which constituted the gist of the issue, and the existence or non-existence of the Presidential Order bore not at all on the justiciability of the controversy. The issue was whether the uncertainty of occurrence of a future event, i.e., the as yet unknown decision of the Claims Tribunal rendered as too speculative and therefore not ripe for adjudication a decision on the right to compensation issue. Since your Honorable Court held in Dames that it did not, the conclusion seems inescapable that the Special Court in this case has refused to follow the precedent established by your decision.

The lesson from the Dames and Regional Rail Reorganization cases is that if a course of events may lead to a taking of private property, the right to compensation is presently justiciable, and it is inconsequential that neither the fact of the taking nor the extent of the taking is assured. And if this be a proper expression of the law, then the distinguishing feature alluded to by the Special Court is irrelevant, and its decision was erroneous.

In both the Dames and the Regional Rail Reorganization cases, your Honorable Court held to be justiciable the issue as to whether, if the taking actually occurred, they would have claims for compensation against the United States under the Tucker Act.

Petitioners seek a similar ruling here, on the basis that the degree of uncertainty regarding the potential

adoption of an act of Congress rises no higher than that regarding the nature of a Claims' Tribunal's ruling, or than that regarding the potential for occurrence of "erosion damage".

III. THE ESOP BENEFICIARIES ARE ENTITLED TO INDEPENDENT REPRESENTATION

The Three R Act very specifically provides that the employees' stock interest in the ESOP are to be immediately vested, subject to defeasance only in the event of certain conditions, which have not occurred and can no longer occur. The Act also very specifically relieves the ESOP managers of all fiduciary responsibility and liability §216(f)(8), 45 U.S.C. §726(f)(8). The Secretary, who was given indirect control over the management of the ESOP, has herself created a conflict by acting in a manner inconsistent with the concept that the employees' rights were fully vested.

The conflict arises because (i) the Secretary controls Conrail, and Conrail in turn controls the management of the ESOP, (ii) the Secretary has now promulgated a signed memorandum of intent, implementation of which the beneficiaries of the ESOP perceive to be against their interests, and (iii) the Secretary has submitted to the Congress proposed legislation which would divest the ESOP beneficiaries of their interest in Conrail stock.

Given the Secretary's presently expressed intention to cause the ESOP interest to be transferred, and her present activity in implementation thereof, there has now arisen a situation which is "plainly at variance with the policy of the legislation as a whole", i.e., the Secretary is acting contrary to the stated Congressional intention that the employees of Conrail are to have and to retain a vested interest in the stock of their

employer. Under these circumstances, it should now become the duty of the Court to support and uphold the stated intention of Congress that the ESOP beneficiaries should have a non-defeasible vested interest in their ESOP.

The beneficiaries of the ESOP petitioned the Court to relieve the Secretary of any control over the ESOP, thereby disrupting the conflict of interest, and providing the beneficiaries with the independent representation and trusteeship which every other ESOP in the country is given as a birthright under ERISA. The basis of this request rests upon the inherent equitable power of any American court to correct manifest injustice, and the established doctrine that where "a literal construction of the words of a statute would lead to an absurd, unjust, or unintended result, the statute must be construed so as to avoid that

result." United States v. Mendoza, 565 F.2d 1285 at 1288 (5th Cir. 1978), modified and affirmed, 581 F.2d 88 (1978).

The Mendoza case, involving as it did construction of a criminal procedural rule, has no factual analogy to the instant situation. However, the principles referred to therein are applicable.

The power of a Court to construe a statute so as to avoid absurd, unjust or unintended results is traced back to Rector of Holy Trinity Church v. United States, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892), from which the Mendoza case quoted the following as the reason for the principle enunciated: 566 F.2d at 1288:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the

> legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, citing by Plowden, that the statute of 1 Edw. II., which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, 'for he is not to be hanged because he would not stay to be burnt.'

143 U.S. at 461, 12 S.Ct. at 512, quoting United States v. Kirby, 7 Wall. 482, 486, 19 L.Ed. 278 (1869). And while the common sense of man may have changed with regard to the therapeutic value of

> bleeding, that same common sense rebels against allowing the defendant to burn because the government is hung up on the literal reading of the statute."

Mendoza also cited Perry v. Commerce Loan Co., 383 U.S. 392, 86 S.Ct. 852, 15 L.Ed.2d 827 (1966), quoting from that decision the following pertinent language: 565 F.2d at 1289

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."

The Special Court recognized its inherent power to interpret statutes to avoid unreasonable results. It then noted that the Congress had deliberately removed fiduciary liability from the ESOP managers (an admitted fact), from which it concluded that Petitioners could not have the relief sought because (Opinion, page 12; Appendix pages 20a-21a:

> "the statutory scheme suggests that Congress foresaw that officials charged with responsibility for the ESOP might face claims of conflict of interest in connection with a sale of Conrail,[1] such as the claims raised in this action, but that Congress deliberately chose not to make these officials accountable to Conrail ESOP beneficiaries for any breach of fiduciary duties 'under any federal or state law[.]'"

****

[1] This statement of the Court is clearly erroneous, as is best evidenced by the fact that in her proposed amendment of the law, the Secretary would have Congress expressly extend the exoneration provisions to the sale transaction. Without such amendment, the exoneration provisions clearly do not cover the Secretary's sale activities.

The Special Court seems to be saying that because Congress relieved the ESOP managers from fiduciary liability, it authorized them to act at will contrary to the interest of the beneficiaries, and removed all power from any Court to control them or to correct the situation.[2]

We suggest that the Court's conclusion is a patent non sequitor. We further suggest that the true issue is whether the present existence of a conflict of interest, whether foreseen or unforeseen by the Congress, arising out of the

****

[2] The absurdity of this ruling is best illustrated by a hypothetical example. If the ESOP managers were stealing cash from the ESOP, it would be quite correct to conclude that the exoneration provisions would prevent a successful suit for recovery of the stolen funds from the thieves, but under the Special Court's interpretation, the exoneration provisions would also prevent a Court from discharging the thieves and appointing a substitute.

expressions of statutory intent

(i) to give the ESOP beneficiaries a vested interest in their Conrail stock, and

(ii) to give the Secretary unfettered discretion to sell the Government's interest in Conrail, from which the Secretary arrogated authority to negotiate the sale of the ESOP stock

constitutes an injustice or absurdity of sufficient magnitude to justify the Court's intervention to correct the situation.

To reach such a conclusion does not go "beyond interpretation", and would not clearly amount to a "rewriting" of the statute. It is only because the Secretary has arrogated to herself unauthorized authority over the ESOP stock that the statutory purposes come into conflict. Without that action, the statutes are mutually exclusive and both capable of non-conflicting implementation. If the Secretary's improper interpretation of her

own authority creates an injustice or absurdity of sufficient magnitude, the principles alluded to above clearly give the Court power to interpret the statute to avoid that injustice or absurdity.

The Special Court apparently did not consider that the Secretary's activities in fact constitute a conflict of interest. This conclusion also flies in the face of superior judicial precedent. Kaufman v. Societe Internationale, 343 U.S. 156, 96 L.Ed. 853, 72 S.Ct. 611 (1952), presented a situation where, pursuant to statutory authority, the United States seized assets of an enemy corporation (Interhandel). The law provided that the interest of "enemy" shareholders were subject to confiscation, but the interests of "non-enemy" shareholders were not. The Government desired to sell all of the assets of the corporation at a price which was not acceptable to "non-enemy" minority shareholders.

The allegations made by the Petitioners in that case are remarkably similar to the allegations made by Petitioners in the present case. As described by your Honorable Court (Mr. Justice Black), these allegations are as follows: 343 U.S. at 160:

> "...Petitioners charge that it is Interhandel's corporate duty to assert a claim for the return of their proportionate interests in the assets even though other stockholders who dominate the corporation are found to be enemies. Petitioners further allege that the corporate management refuses to assert such a claim, but continues to claim only a return of all assets on the theory that whatever return is obtained must be divided among enemy and non-enemy shareholders in proportion to their stockholdings. This position is taken, Petitioners charge, because the suit is being controlled by the very stockholders on whose account the custodian seized the property and his interest will be worthless if they are found to be enemies. Petitioners allege that this enemy corporate management, fearing confiscation of its

> enemy tainted interests, is about to settle the corporate claim with the custodian for an amount less than the value of the non-enemy part of the assets."

The similarity is startling. Both cases involve the Government of the United States actively engaged in selling off the assets of a business which it came to own, under terms and conditions which are unfair to minority interests.

Mr. Justice Black wrote: 343 U.S. at 159-60:

> "Our holding is that when the Government seizes assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected. This holding is not based on any technical concept of derivative rights appropriate to the law of corporations. It is based on the Act which enables one not an enemy...to recover any interest, right or title which he had in the property vested."

Similarly, Plaintiffs here do not seek relief on some esoteric notion of derivative rights. Just as in the Interhandel situation, Plaintiffs here depend on statutory authority, in this case the stated Congressional intent that the ESOP is vested, an attribute that prevents it from being disturbed by the dominant majority interest, which coincidentally in both cases happens to be the Government of the United States.

CONCLUSION

It is interesting to note that in the Lower Court proceedings, the defense concentrated on attacking the justiciability of all of the issues involved. It seems that the Lower Court held that two of the issues, i.e., review of the Secretary's authority and the ESOP beneficiaries' right to independent representation were in fact justiciable issues, and decided them on the merits against Petitioners. The third

issue, contrary to all authority, the Court ruled to be unripe for decision. It is respectfully submitted that the discussion in this Petition demonstrates that the issues involved are of sufficient substance, have national importance, and have been decided contrary to precedent established in the highest Court of the land. Under these circumstances, this Petition for Certiorari should be granted to allow full consideration of the issues by the Supreme Court of the United States.

Respectfully submitted,

BY: _____
LAWRENCE GOLDBERG

BY: _____
PAUL SHALITA

Goldberg, Dickman, Shalita & Tabas, P.C.
230 South 15th Street
5th Floor
Philadelphia, PA 19102
(215) 985-0800

Attorneys for Petitioners

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

THOMAS B. HOOVER, ET AL., Plaintiffs	)	§1152 Panel Civil Action No. 85-07
v.	)	
ELIZABETH HANFORD DOLE, ET AL., Defendants	)	

Before: GASCH, Presiding Judge, and BRYANT and WEINER, Judges

MEMORANDUM-ORDER

GASCH, Presiding Judge:

I. BACKGROUND

Plaintiffs Thomas B. Hoover, Violet J. Byerly, D. Garrett Spear, James DiGiovannantonio, Elizabeth R. Keenan, Richard C. Arpin, Duane R. Carter, and Lee E. Verzinskie, all present or former employees of defendant Consolidated Rail Corporation ("Conrail"), have brought this

action[1] for declaratory and injunctive relief against Secretary of Transportation Elizabeth Hanford Dole, Conrail, and the Norfolk Southern Corporation ("Norfolk Southern"). Plaintiffs' complaint raises three contentions regarding the proposed sale of the interest of the United States in Conrail stock to Norfolk Southern that was recently announced by Secretary Dole and Norfolk Southern[2] and the mechanisms now in place for consideration of that proposal. First, plaintiffs contend that

---

[1]Plaintiffs seek to pursue this litigation as a class action on behalf of all "those persons who are former and present employees of Conrail[.]" Complaint, ¶2. Of course, an action "is not maintainable as a class suit merely because it is not designated as such in the pleadings; whether it is or not depends upon the attending facts." 3B Moore's Federal Practice ¶23.02[2] at 23-89 (1982).

[2]Section 1142 of the Northeast Rail Service Act of 1981 ("NRSA"), Pub. L. 97-35, 95 Stat. 357, 654 (Aug. 13, 1981), directed the Secretary to attempt to sell the interest of the United States in Conrail stock once the Board of Directors of the United States Railway Association determined that Conrail would be a profitable carrier.

Secretary Dole has exceeded her statutory authority and taken plaintiffs' property in violation of the Fifth Amendment's Due Process Clause by entering into an agreement of intent to sell not only the government's interests in Conrail but the interests of an Employee Stock Ownership Program ("ESOP") established on behalf of Conrail employees as well. Complaint, ¶33.[3] Second, plaintiffs allege that the ESOP, as presently operated, provides no

---

[3]Congress initially called for creation of the Conrail ESOP in Section 3 of the United States Railway Association Amendments Act of 1978, Pub. L. 95-565, 92 Stat. 2397 (Nov. 1, 1978). The legislation required that prior to establishment of the ESOP, Conrail have submitted a written plan to exempt those associated with the ESOP from "any fiduciary duty, responsibility or liability for the acquisition of, investment in, or retention of, any security or interest therein of [Conrail] or for any other transaction[.]"

Congress passed such a limit on liability in 1980 by adding subsection (8)(A) to Section216(f) of the Regional Rail Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985 (Jan. 2, 1974) ("3R Act"). See Pub. L. 96-254 §118, 94 Stat. 399, 406 (May 30, 1980).

opportunity for independent representation of the interests of ESOP participants in any proceeding concerning the sale of the ESOP's interests in Conrail. Id. at ¶32.[4] Finally, the complaint alleges that Secretary Dole acted ultra vires by negotiating a sale to Norfolk Southern that did not require Norfolk Southern to purchase all of Conrail's assets. Id. at ¶34.[5]

---

[4]Plaintiffs allege that the committee managing the Conrail ESOP is appointed by Conrail's directors, who in turn are alleged to be selected by the Department of Transportation. Complaint, ¶32. The Complaint asks the Court to dismiss the current managers and appoint the putative class representatives to administer the ESOP.

[5]According to plaintiffs, because there has been no finding that Conrail is not profitable, the Secretary is required by NRSA to sell Conrail as a single entity. Plaintiffs allege that the MOI violates this requirement by barring Norfolk Southern from retaining certain Conrail assets whose ownership by Norfolk Southern would, in the government's view, raise antitrust problems.

Together with the complaint, plaintiffs filed an application for preliminary injunction. The motion for preliminary injunction asks for the Court to enjoin Secretary Dole and Norfolk Southern "from negotiating the sale of the stock interest in Conrail held by the Conrail Employee[] Stock Option Plan" and to bar these defendants from "implementing" the Memorandum of Intent ("MOI") agreed to by Norfolk Southern and the government. Plaintiffs also ask the Court to appoint them to serve as independent trustees in the administration of the Conrail ESOP.

On June 10, 1985, defendants Dole and Norfolk Southern filed motions to dismiss asserting inter alia that the matter was not ripe for review and that plaintiffs had failed to state a claim on the merits. Together with these motions, defendants filed various documents concerning the Norfolk Southern proposal including the MOI. On June 28, 1985, after hearing

counsel for plaintiffs and defendants argue pending motions in open court, the Court advised counsel for plaintiffs that in light of the filing of these matters outside the pleadings, the Court would treat defendants' motions as motions for summary judgment instead of motions to dismiss.[6] Counsel for plaintiffs then informed the Court the plaintiffs would file any additional materials they wished to have considered in connection with the motions for summary judgment by July 3, 1985. Plaintiffs' counsel notified the

---

[6]Federal Rule of Civil Procedure 12(b) provides that: "If on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." See, e.g., Gordon v. National Youth Work Alliance, 675 F.2d 356, 361 (D.C. Cir. 1982); Woods v. Dugan, 660 F.2d 379, 380.81 (8th Cir. 1981).

Executive Attorney of this Court on July 3 that plaintiffs had elected not to submit any additional materials.

After reviewing the record herein, the Court finds, for the reasons discussed below, that summary judgment is warranted.

II. DISCUSSION

A. Ripeness

The primary argument raised by defendants Dole and Norfolk Southern in support of the motions for summary judgment is the contention that the actions complained of are not ripe for review.

Federal courts are "without power to give advisory opinions" or to "decide abstract, hypothetical or contingent questions[.]" Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945). A court deciding whether a controversy is ripe for review must evaluate "both the fitness of the issue for judicial decision and the hardship to the

parties of withholding court consideration." Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967).

In response to defendants' ripeness challenge, plaintiffs concede that significant aspects of the complaint are not ripe for review[7] but insist that the Court does have before it three issues that are justiciable: 1) whether or not, merely by discussing possible terms for the sale of the ESOP stock, Secretary Dole has exceeded her statutory authority; 2) whether or not plaintiffs are entitled to appointment of an independent trustee to represent the interests of the ESOP; and

---

[7]During oral argument, plaintiffs' counsel conceded that plaintiffs claim that Secretary Dole had exceeded her authority by negotiating an agreement with Norfolk Southern that allegedly would not require Norfolk Southern to purchase Conrail as a "single entity" was not yet ripe. Counsel also stipulated that any challenges based on the actual sale of the ESOP stock were not yet ripe as any sale remains contingent on a number of events including enactment of legislation.

3) whether the ESOP beneficiaries would have "claims against the Government to the extent that they are under compensated" if the sale to Norfolk Southern is consummated. Plaintiffs' Brief in Further Support of Request for Affirmative Relief and Contra Defendants' Motion to Dismiss ("Plaintiffs' Opposition") at 6. As discussed infra, the last of these issues is not ripe for review.

As plaintiffs now characterize the complaint, they seek a declaratory judgment on the following question: "if the ESOP stock is involuntarily taken, do the ESOP beneficiaries have Tucker Act[8] claims." Plaintiffs Opposition at 7. In arguing that this issue is justiciable,

---

[8]The Tucker Act confers jurisdiction on the Court of Claims: [T]o render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon an express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. 28 U.S.C. §1491.

plaintiffs rely on Dames & Moore v. Regan, 453 U.S. 654, 689 (1981). Even a cursory review of Dames & Moore, however, demonstrates that the case at bar is distinguishable.[9] In contrast to the situation in Dames & Moore, where the

---

[9]The action in Dames & Moore was brought by a plaintiff who had already obtained prejudgment attachments and a subsequent judgment against Iranian defendants but was barred from executing the judgment pursuant to a presidential Executive Order issued to implement the terms of the agreement between Iran and the United States for release of American hostages held in Iran and certain Iranian assets held in the United States. Dames & Moore, 453 U.S. at 665-67. The Executive Order in question provided for all Iranian claims to be "suspended" pending their presentation to an Iran-United States Claims Tribunal with the suspension terminating if the Claims Tribunal determined that it had no jurisdiction over the claim. Id. at 666. Although the Dames & Moore Court reached the question of whether the plaintiff would have a remedy under the Tucker Act, it did so in light of "the President's actions," i.e., actions that were already in effect--and the well settled rule that "there must be at the time of taking 'reasonable, certain and adequate provision for obtaining compensation.'" Id. at 689 (citations omitted). In the action now before the Court there has not yet been any comparable governmental action.

President had already issued an Executive Order suspending the plaintiff's claim, in this action there is no governmental action now in effect[10] which can be

---

[10]By its terms, the MOI is not the all encompassing "definitive agreement" for the sale of Conrail that plaintiffs apparently envisioned in filing this action. To begin with, although the MOI anticipates that Norfolk Southern will purchase the Conrail stock owned by the ESOP and although the MOI constitutes the Secretary's decision, assuming all conditions for sale are satisfied, to sell the government's interests in Conrail to Norfolk Southern, the MOI does not purport to sell the ESOP's interest in Conrail or require conveyance of the ESOP's interest at any price. Instead, the MOI provides only that at or prior to closing, Norfolk Southern or Conrail "shall have made appropriate arrangements with respect to the employees of Conrail to accomplish (i) the acquisition [by Norfolk Southern] of such employees' 15% beneficial interest in Conrail." MOI, ¶2 (emphasis supplied). An exhibit to the Memorandum of Intent listing Norfolk Southern's "proposed arrangements for Conrail employees" notes that Norfolk Southern has committed "a total amount of $375 million, of which an amount determined to be the fair value of the assets and rights of the existing Conrail ESOP shall be contributed to such ESOP." The MOI further provides as a condition to the government's obligation to sell that "[l]egislation shall have been enacted...providing a mechanism for definitively valuing the existing Conrail employee stock ownership plan." MOI, ¶9(d).

reviewed to consider what remedies ultimately may be available to plaintiffs. Congress has not even begun to consider the mechanism for valuation of the ESOP's interests or the nature of any legislative protections it may wish to afford to ESOP beneficiaries.[11] Thus, unlike the Regional Rail Reorganization Act Cases, 419 U.S. 102, 126 (1974), there is no basis for the Court to consider whether Congress has "withdrawn the Tucker Act grant of jurisdiction to the Court of Claims" since legislation that would need to be considered in this regard has not

---

[11]Indeed, the Senate Committee on Commerce, Science and Transportation, the only congressional body to take action to date on legislation providing for the sale of Conrail, apparently adopted proposed legislation that did not include a provision addressing this issue. The Committee Report accompanying the Committee bill states that "it will be necessary to offer an amendment containing such a mechanism when S. 638 is brought to the Floor." S. Rep. No. 99-98, 99th Cong., 1st Sess. 41 (1985).

yet been enacted.[12]

The second factor to be considered in resolving the question of ripeness, the hardship to the parties of withholding court consideration, also counsels against deciding the Tucker Act issue at this time. In the absence of a ruling, plaintiffs will face continued uncertainty con-

---

[12]As this Court has stated:

> If the United States eliminates or substantially impairs an owner's use of his property or requires him to convey it, there is a "taking," which gives rise to a claim under the Constitution, whether or not the United States so intended... Such claims would be cognizable in the Court of Claims [pursuant to the Tucker Act] as claims founded upon the Constitution, unless the Act [authorizing the taking] by fair implication withdraws such jurisdiction.

In re Penn Central Transportation Co., 384 F. Supp. 895, 940-41 (Regional Rail Reorg. Ct. 1974) (noted with approval in Regional Rail Reorganization Act Cases, the Supreme Court held that the 3R Act did not bar a Tucker Act remedy for just compensation for any "erosion taking" effected by the 3R Act. 419 U.S. at 136.

cerning the nature of any remedies that ultimately may be available to them. This falls far short of the hardship recognized in Abbott Laboratories, for example, where withholding resolution would have required "an immediate and significant change in the plaintiffs' conduct [] with serious penalties attached to noncompliance[.]" 387 U.S. at 153. Accordingly, this question is not yet ripe for adjudication.

B. Statutory Authority of Secretary

Plaintiffs contend that Secretary Dole has exceeded her statutory authority by agreeing to the MOI and discussing possible terms for the sale of the ESOP stock. In plaintiffs' view, Secretary Dole has broad discretion with regard to the interests of the United States in Conrail but no role whatsoever with regard to discussions implicating the ESOP's interests.

This contention is without merit. Notwithstanding the conclusory allegations in the complaint, the records leaves no room for a genuine dispute as to the limited role that Secretary Dole has played to date with regard to the ESOP stock. As discussed above, the MOI does not purport to sell the ESOP's interest or require conveyance of that interest at any price. Moreover any sale of any Conrail stock to Norfolk Southern is, by the terms of the MOI, expressly conditioned on enactment of legislation ratifying the proposed sale to Norfolk Southern. MOI, ¶9(d). Thus, the Secretary has merely: a) made a commitment to sell the government's interests if "appropriate arrangements" are made with regard to the ESOP and Congress expressly authorizes the proposed sale to Norfolk Southern; and b) recommended that Congress enact legislation to provide for the sale.

We do not read the Secretary's authority as narrowly as plaintiffs. Section 401 of the 3R Act, as amended by NRSA, authorized the Secretary to "submit to the Congress a plan for the sale, in block or by public offering, of the interest of the United States in the common stock of [Conrail]." Congress directed that such a plan achieve three goals: "A) ensure continued rail service; B) promote competitive bidding for such common stock; and C) maximize the return to the United States on its investment." In light of Congress' decision to vest the Secretary with substantial responsibility for proposing a mechanism for the sale of the government's interests in a manner consistent with these goals, we are not prepared to say that the Secretary's limited foray into matters touching on the ESOP's interests exceeded the Secretary's authority. This conclusion is buttressed by the general grant of authority in

Section four of the Department of Transportation Act,[13] which directs the Secretary to "exercise leadership under the direction of the President in transportation matters" and authorizes her to "make recommendations to the President and the Congress for their consideration and implementation[.]" Because the Secretary has made enactment of legislation incorporating her recommendations a prerequisite to completion of the proposed sale, we hold that the actions before us do not exceed her statutory authority.[14]

---

[13]Pub. L. 94-348 §4, 80 Stat. 931 (Oct. 15, 1966) (codified at 49 U.S.C. §1653.).

[14]The case at bar does not require the Court to consider two issues: a) whether the Secretary would exceed her statutory authority by conveying the ESOP's interests in Conrail in the absence of legislation addressing this issue; and b) whether the provision for limited Congressional review contained in Section 401 satisfies the principles enunciated in Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983). Plaintiffs concede that the former issue is not yet (note con't)

C. Appointment of Independent Trustee

Plaintiffs have also petitioned the Court to "relieve the Secretary of any control over the ESOP" and provide the beneficiaries of the ESOP "with the independent representation and trusteeship which every other ESOP is given as a birthright under ERISA."[15] Plaintiffs concede that the Conrail ESOP is not subject to ERISA but contend that the existing structure governing the ESOP creates a "conflict of interest" between the Secretary's interests and those of the ESOP. Plaintiffs contend that "Congress could not have foreseen" this conflict and ask the Court to use its power to construe statutes to avoid absurd, unjust or unintended results to provide the independent

---

ripe while the latter issue is not implicated in plaintiffs' complaint.

[15]ERISA is the common designation for the Employee Retirement Income Security Act, 29 U.S.C §1132 et seq.

trustee they seek. Plaintiffs' Opposition at 20-21.

As plaintiffs properly note, it is well established that statutes should be interpreted to avoid unreasonable results whenever possible. See, e.g., American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982); Commissioner v. Brown, 380 U.S. 563, 571 (1965). A court may depart from the literal construction of a statute "when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act in question." 2A Sands, Statutes & Statutory Construction §45.12 (4th ed. 1973) (footnote omitted). Nevertheless we sit as judges whose task is to apply the law and may not ignore statutes merely because they may seem harsh. See, e.g., First National City Bank v. Compania de Aguaceros, S.A., 398 F.2d 779, 784 (2d Cir. 1968). Thus as one court has noted, "such an approach to

interpretation of statutes must be used with the utmost caution, for the line between irrationality and mere bad policy is a wavering and uncertain one." Sierra Club v. Environmental Protection Agency, 719 F.2d 436, 445 (D.C. Cir. 1983), cert. denied, 104 S. Ct. 3571 (1984).

Viewed in this context it is clear that the statutory provisions plaintiffs rely on cannot be construed to grant the relief plaintiffs seek. Contrary to plaintiffs' characterizations, the statutory scheme suggests that Congress foresaw that officials charged with responsibility for the ESOP might face claims of conflict of interest in connection with a sale of Conrail, such as the claims raised in this action, but that Congress deliberately chose not to make these officials accountable to Conrail ESOP beneficiaries for any breach of fiduciary duties "under any

federal or state law[.]"[16] In the face of this decision, it cannot be said that the present structure is inconsistent with the purposes and policies of the 3R Act, as amended. To conclude otherwise would go beyond construction or interpretation and require that this Court completely rewrite

---

[16]Section 216(f)(8)(A) of the 3R Act provides that no ESOP manager:

> shall have or be subject to any fiduciary responsibility, obligation, or duty, nor shall any such person be subject to civil liability, under any federal or state law, as a fiduciary or otherwise
>
> (i) in connection with the employee stock ownership plan... on account of any reorganization or restructuring of [Conrail,] its successors or assigns, or their assets or capital structure...
>
> (ii) for or in connection with... the such disposition of any [Conrail] security to the extent that such disposition is made in connection with a reorganization or restructuring of [Conrail] or [its] assets or capital structure, as directed or approved by... the United States...

45 U.S.C. §726(f)(8)(A).

statutes enacted by Congress.[17]

Wherefore, it is ordered that plaintiffs' application for preliminary injunction is denied and it is further ordered that defendants' motions for summary judgment are granted.

/s/ Oliver Gasch
Oliver Gasch, Presiding Judge

/s/ William B. Bryant
William B. Bryant, Judge

/s/ Charles R. Weiner
Charles R. Weiner, Judge

Date: July 9, 1985

[17] See, e.g., Sierra Club, 719 F.2d at 445 (Court's power limited to "strain[ing] the statutory language" to avoid unreasonable result).

TITLE I—GENERAL PROVISIONS

DECLARATION OF POLICY

SEC. 101. (a) FINDINGS.—The Congress finds and declares that—

(1) Essential rail service in the midwest and northeast region of the United States is provided by railroads which are today insolvent and attempting to undergo reorganization under the Bankruptcy Act.

(2) This essential rail service is threatened with cessation or significant curtailment because of the inability of the trustees of such railroads to formulate acceptable plans of reorganization. This rail service is operated over rail properties which were acquired for a public use, but which have been permitted to deteriorate and now require extensive rehabilitation and modernization.

(3) The public convenience and necessity require adequate and efficient rail service in this region and throughout the Nation to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, States and their political subdivisions, and consumers.

(4) Continuation and improvement of essential rail service in this region is also necessary to preserve and maintain adequate national rail services and an efficient national rail transportation system.

(5) Rail service and rail transportation offer economic and environmental advantages with respect to land use, air pollution, noise levels, energy efficiency and conservation, resource allocation, safety, and cost per ton-mile of movement to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest.

(6) These needs cannot be met without substantial action by the Federal Government.

(b) PURPOSES.—It is therefore declared to be the purpose of Congress in this Act to provide for—

(1) the identification of a rail service system in the midwest and northeast region which is adequate to meet the needs and service requirements of this region and of the national rail transportation system;

(2) the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region;

(3) the establishment of the United States Railway Association, with enumerated powers and responsibilities;

(4) the establishment of the Consolidated Rail Corporation, with enumerated powers and responsibilities;

(5) assistance to States and local and regional transportation authorities for continuation of local rail services threatened with cessation; and

(6) necessary Federal financial assistance at the lowest possible cost to the general taxpayer.

TITLE II—UNITED STATES RAILWAY ASSOCIATION

FORMATION AND STRUCTURE

SEC. 201. (a) ESTABLISHMENT.—There is established in accordance with the provisions of this section, an incorporated nonprofit association to be known as the United States Railway Association.

(b) ADMINISTRATION.—The Association shall be directed by a Board of Directors. The individuals designated, pursuant to subsection (d)(2) of this section, as the Government members of such Board shall be deemed the incorporators of the Association and shall take whatever steps are necessary to establish the Association, including filing of articles of incorporation, and serving as an acting Board of Directors for a period of not more than 45 days after the date of incorporation of the Association.

(c) STATUS.—The Association shall be a government corporation of the District of Columbia subject, to the extent not inconsistent with this title, to the District of Columbia Nonprofit Corporation Act (D.C. Code, sec. 29-1001 et seq.). Except as otherwise provided, employees of the Association shall not be deemed employees of the Federal Government. The Association shall have succession until dissolved by Act of Congress, shall maintain its principal office in the District of Columbia, and shall be deemed to be a resident of the District of Columbia with respect to venue in any legal proceeding.

(d) BOARD OF DIRECTORS.—(1) The Board of Directors of the Association shall consist of 5 individuals, as follows:

(A) The Chairman, who shall be the individual serving as Chairman on the effective date of this subsection, until the expiration of his term of office or his resignation, or his replacement, who shall be selected by the outgoing Chairman and the other members of the Board.

(B) The Secretary of Transportation.

(C) The Comptroller General of the United States.

(D) The Chairman of the Commission.

(E) The Chairman of the Board of Directors of the Corporation.

(2) The Chairman may not have any employment or other direct financial relationship with any railroad. The Chairman shall receive $300 per diem when engaged in the actual performance of his duties plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties.

(e) TERM OF OFFICE.—The term of office of the Chairman of the Board of Directors of the Association shall expire on December 31, 1983. The Chairman may be reappointed and the term of the Chairman shall be 3 years.

(f) QUORUM.—Three members of the Board of Directors, or their representatives, shall constitute a quorum for the transaction of any function of the Association.

(g) The Board of Directors shall, on the effective date of this subsection, assume the functions previously performed by the Finance Committee.

(h) The members of the Board of Directors may send representatives to meetings of such Board, and such representatives may exercise full powers of the members.

(g)[1] MISCELLANEOUS.—(1) The Association shall have a seal which shall be judicially recognized.

(2) The Administrator of General Services shall furnish the Association with such offices, equipment, supplies, and services as he is authorized to furnish to any other agency or instrumentality of the United States.

(3) The Secretary is authorized to transfer to the Association or the Corporation rights in intellectual property which are directly related to the conduct of the functions of the Association or the Corporation, to the extent that the Federal Government has such rights and to the extent that transfer is necessary to carry out the purposes of this Act.

(4) Any reference in this Act to the Chairman of the Commission is to the Chairman of the Commission or the person who is at the time performing the duties of the Chairman of the Commission in accordance with law.

(h)[2] USE OF NAMES.—No person, except the Association, shall hereafter use the words "United States Railway Association" as a name for any business purpose. Violations of this provision may be enjoined by any court of general jurisdiction in any action commenced by the Association. In any such action, the Association may recover any actual damages flowing from such violation, and, in addition, shall be entitled to punitive damages (regardless of the existence or nonexistence of actual damage) in an amount not to exceed $100 for each day during which such violation was committed. The district courts of the United States shall have jurisdiction over actions brought under this subsection, without regard to the amount in controversy or the citizenship of the parties.

TITLE III—CONSOLIDATED RAIL CORPORATION

FORMATION AND STRUCTURE

SEC. 301. (a) ESTABLISHMENT.—There shall be established within 300 days after the date of enactment of this Act, in accordance with the provisions of this section, a corporation to be known as the Consolidated Rail Corporation or such other corporate name as may be duly adopted by the Corporation.

(b) STATUS.—The Corporation shall be a for-profit corporation established under the laws of a State and shall not be an agency or instrumentality of the Federal Government. The Corporation shall be deemed a common carrier by railroad under section 1(3) of the Interstate Commerce Act (49 U.S.C. 1(3)), shall be subject to the provisions of this Act and, to the extent not inconsistent with such Acts, shall be subject to applicable State law. The principal office of the Corporation or of its principal railroad operating subsidiary shall be located in Philadelphia in the Commonwealth of Pennsylvania.

(c) INCORPORATORS.—(1) The members of the executive committee of the Association shall be the incorporators of the Corporation and shall take whatever steps are necessary to establish the Corporation, including the filing of articles of incorporation.

(2) Notwithstanding any provision of State law, after the date of enactment of this paragraph, the members of the executive committee of the Association (including duly authorized representatives of members who are authorized by this Act to be represented) and the chief executive officer and chief operating officer of the Corporation shall adopt the bylaws of the Corporation and serve as the Board of Directors of the Corporation until all members of the Board of Directors of the Corporation have been selected in accordance with subsection (d) of this section. The chief executive officer shall serve as chairman of such Board until a chairman thereof is selected pursuant to subsection (d) of this section, after which time such chairman shall serve at the pleasure of such Board.

(d) BOARD OF DIRECTORS.—(1) Notwithstanding any provision of State law, the articles of incorporation and bylaws of the Corporation shall provide that the Board of Directors of the Corporation shall consist of 13 members selected in accordance with the articles and bylaws of the Corporation, as follows:

(A) six individuals selected by the holders of the Corporation's debentures and series A preferred stock voting as one class, with every $100 principal amount of debentures, and every $100 liquidation amount of series A preferred stock each receiving one vote for directors;

(B) three individuals selected by the holders of the Corporation's series B preferred stock; and

(C) two individuals selected by the holders of the Corporation's common stock.

(2) The chief executive officer and the chief operating officer of the Corporation shall also serve on the Board, but the chief executive officer and chief operating officer of the Corporation shall not be entitled to vote on the election or removal of either. In the event a vacancy occurs on the Board of Directors due to death, disability, or resignation of a director, such vacancy shall be filled only by a vote of the holders of the class of securities that initially elected such director.

(e) INITIAL CAPITALIZATION.—(1) The Corporation is authorized to issue debentures series A preferred stock, series B preferred stock, common stock, contingent interest notes, and other securities.

(2) Debentures and series A preferred stock shall be issued initially to the Association. Series B preferred stock and common stock shall be issued initially to the estates of railroads in reorganization in the region, to railroads leased, operated, and controlled by railroads in reorganization in the region, and to other persons leased, operated or controlled by a railroad in reorganization who are transferors of rail properties in exchange for rail properties transferred to the Corporation pursuant to the final system plan. Notwithstanding any other provisions of State or Federal law, the series B preferred stock and common stock shall have terms and conditions not inconsistent with the final system plan. As a condition of its investment in the Corporation, the Association may require that the Corporation adopt limitations consistent with the final system plan on the circumstances under which dividends on the series B preferred stock and common stock are payable so long as any of the debentures or series A preferred stock are outstanding. Notwithstanding anything to the contrary in the final system plan, the initial authorized number of shares of series B preferred stock may be 35,000,000, and the Corporation may issue initially for the purpose of the deposit required under section 303(a)(1) of this Act such numbers of shares of series B preferred and common stock as the Association shall certify to the Special Court pursuant to section 209(c)(1)(3) of this Act, including any modifications in such numbers of shares as may be ordered by the Special Court for the purpose of, and in connection with, such deposit and certification.

(f) OFFICERS.—The officers of the Corporation shall include a chief executive officer and a chief operating officer, who shall be appointed by the Board of Directors and who shall serve at the pleasure of the Board; and such other officers as shall be provided for in the bylaws of the Corporation.

(g) VOTING TRUSTEES.—For and during the period between the deposit of securities of the Corporation with the special court, in accordance with section 303(a) of this title, and the distribution of such securities, in accordance with section 303(c) of this title, the special court shall, within 30 days after the date of conveyance pursuant to section 303(b)(1) of this Act, appoint one or more voting trustees for each class of securities which is so deposited. Such voting trustees shall, on behalf of the distributees, exercise the rights of the holders of such securities as their interests may appear. Within 30 days after such appointment, such voting trust-

ees shall select members of the Board of Directors of the Corporation on behalf of the holders of the class of securities whose rights they exercise pursuant to this subsection.

(h) ANNUAL REPORT.—The Corporation shall transmit to the Congress and the President, not later than 90 days after the end of each fiscal year, a comprehensive and detailed report on all activities and accomplishments of the Corporation during the preceding fiscal year.

(i) LIABILITY OF DIRECTORS.—No director of the Corporation shall be liable, for money damages or otherwise, to any party by reason of the fact that such person is or was a director, if, with respect to the subject matter of the action, suit, or proceeding, such person was fulfilling a duty which he in good faith reasonably believed to be required by law or vested in him in his capacity as a director of the Association or as an officer of the United States. The United States shall indemnify such person against all judgments, amounts paid in settlement, and costs and expenses (including fees of accountants, experts, and attorneys), actually and reasonably incurred in connection with any such action, suit, or proceeding in which such person is determined to have met such standard of conduct. This subsection shall not be construed to grant any immunity from any criminal law of the United States.

(j) SIGNAL SYSTEMS.—If, within two years after the effective date of this subsection, the Corporation applies for the permission of the Secretary to substitute manual block signal systems for automatic block signal systems on lines on which less than 20,000,000 gross tons of freight are carried annually, the Secretary shall approve or disapprove such application within 90 days of its submission.

(f)(1) The Association shall not invest the final $245,000,000 of the additional investment in the Corporation authorized by the Regional Rail Reorganization Act Amendments of 1978 unless and until (A) the Corporation has in effect an employee stock ownership plan which satisfies the requirements of paragraphs (2) and (3), and (B) the requirements of the other paragraphs of this subsection have been satisfied.

(2) The employee stock ownership plan shall:

(A) provide:

(i) for a transfer to the plan and allocation to the accounts of plan participants in periodic installments of Series A preferred stock of the Corporation with a stated redemption value of at least $345,000,000 or any other securities in an amount determined by the Association, with the concurrence of the Finance Committee, as constituting a meaningful interest in the Corporation, or any combination thereof so determined by the Association, with the concurrence of the Finance Committee. The use of Series A preferred stock to fund the Employee Stock Ownership Plan shall not be interpreted to relieve ConRail of the responsibility for repaying in full to the United States Railway Association its indebtedness as represented by all shares originally issued under Public Law 94-210 and this Act;

(ii) for immediate vesting of the rights of participants to such securities upon allocation, subject to defeasance as a result of the plan's termination which termination shall occur in the event that, by the end of the 120th month beginning after the month in which securities or interests therein are first allocated to participants' accounts, the Corporation has not attained for two consecutive quarters positive net income and a freight labor cost to freight revenue ratio equal to the average such ratio for all Class I railroads in 1977, as determined pursuant to procedures adopted by the Corporation pursuant to regulations promulgated by the Association with the concurrence of the Finance Committee;

(B) be an employee benefit plan which is designed to invest primarily in employer securities;

(C) meets such other requirements (similiar to requirements applicable to employee stock ownership plans as defined in section 4975(e)(7) of the Internal Revenue Code of 1954) as the Secretary of the Treasury or his delegate may describe;

(D) have been approved by the Board of Directors of the Corporation to the extent and in the manner which may be required by the Corporation's articles of incorporation and bylaws then in effect; and

(E) have been prepared in consultation with, and been approved by, the Association and the Finance Committee

(3) Notwithstanding any other provision of law, if a plan does not meet the requirements of section 401 of the Internal Revenue Code of 1954—

(A) stock transferred under paragraph (2) and allocated to the account of any participant under paragraph (2) shall not be considered income of the participant or his beneficiary under the Internal Revenue Code of 1954 until such stock or dividends are actually distributed or made available to the participant or his beneficiary and, at such time, shall be taxable under section 72 of the Internal Revenue Code of 1954 (treating the participant or his beneficary as having a basis of 0 in the stock);

(B) no amount shall be allocated to any participant under the plan in excess of the amount which might be allocated if the plan met the requirements of section 401 of the Internal Revenue Code of 1954; and

(C) the plan must meet the requirements of sections 410 and 415 of the Internal Revenue Code of 1954.

(4) The Corporation shall adopt such terms and conditions governing the securities or interests therein to be transferred to the plan (including limitations on voting rights) as the Association, with the concurrence of the Finance Committee, determines are necessary to protect reasonably the interests of the United States in the litigation pursuant to section 303(c) of this Act and in the event of any action to further reorganize or restructure the Corporation's assets or capital structure.

(5) The Corporation, the Association, and a representative appointed by the Chairman of the Railway Labor Executives' Association as representative of all the classes or crafts of employees of the Corporation shall engage in negotiations to agree upon a plan in accordance with the provisions of this subsection. For purposes of this subsection, the Railway Labor Executives' Association shall be deemed to represent all of the representatives of crafts or classes of employees of the Corporation and its subsidiaries as though that organization held powers of attorney from each representative of a craft or class for the limited purposes of negotiating and agreeing upon an employee stock ownership plan. The parties shall incorporate their agreement into a written plan instrument specifying the terms and conditions set forth in this subsection and such other terms and conditions as they may decide upon, with the concurrence of the Finance Committee, unless the parties are unable to reach on an agreement on the plan following the exertion of every reasonable effort to do so, in accordance with the Railway Labor Act, in which event, the Corporation and the Association, with the concurrence of the Finance Committee, shall establish a written plan with such terms and conditions as they may agree upon in accordance with this subsection. The plan shall not be subject to change under the provisions of section 6 of the Railway Labor Act until after such time as securities have been distributed from the plan to the participants in the plan or their benefici-

aries pursuant to the terms of the plan. Within one year after the effective date of this subsection, the Corporation shall transmit a draft of such plan to the Congress and shall report on its progress in establishing and administering the plan. The report shall include recommendations of contractual and statutory provisions necessary to reasonably (A) exempt any Trustee of the plan, the Corporation, the Association, any member of the Finance Committee, and any other person from any fiduciary duty, responsibility or liability for the acquisition of, investment in, or retention of any security or interest therein of the Corporation or for any other transaction contemplated by this subsection and (B) provide for the United States to indemnify, defend, and hold harmless such persons against any and all liabilities, claims, actions, judgments, amounts paid in settlement, and costs and expenses actually incurred in connection with any matter so exempted in which it is determined that such persons were acting in good faith and in a manner they believed to not be opposed to the best interests of the plan.

(6) Within fourteen months of the effective date of this subsection, the Association shall report to the Congress on the draft plan and on any legal obstacle to the ability of the Corporation to effectuate and implement an employee stock ownership plan of the nature contemplated by this subsection, including specific recommendations on amendments to this subsection and other relevant laws which would harmonize the requirements of this subsection with those other laws. The Department of Transportation and the Department of the Treasury, as each finds appropriate, shall provide separate comments to the Association for inclusion with such report.

(7) For the purposes of this subsection, the officers of each duly authorized representative of the crafts or classes of the employees of the Corporation who have been given leaves of absence by the Corporation to serve as such officers, are to be eligible to participate in such plan on the same basis as are employees whose employment is governed by a collective bargaining agreement with the Corporation.

(8)(A) Except as provided in subparagraph (B) of this paragraph, no person described in subparagraph (C) of this paragraph shall have or be subject to any fiduciary responsibility, obligation, or duty, nor shall any such person be subject to civil liability, under any Federal or State law, as a fiduciary or otherwise—

(i) in connection with the employee stock ownership plan and related trust established by the Corporation pursuant to the requirements of this subsection or with ConRail Equity Corporation (I) on account of any reorganization or restructuring of the Corporation, its successors or assigns, or their assets or capital structure, or (II) on account of any action taken or not taken by the Corporation which may affect its ability to attain the performance levels established in connection with the plan pursuant to paragraph (2)(A)(ii) of this subsection;

(ii) for or in connection with the establishment, continuation or implementation of the plan and related trust or of ConRail Equity Corporation or the acquisition of, investment in or retention of any security of the Corporation or ConRail Equity Corporation, or of any of their successors and assigns, by the plan or ConRail Equity Corporation, or the disposition of any such security to the extent that such disposition is made in connection with a reorganization or restructuring of the Corporation, its successors and assigns, or their assets or capital structure, as directed or approved by or on behalf of the Association or the United States, or the acquisition or retention of any cash, security or other property received in connection with any such reorganization or restructuring; or

(iii) for or in connection with any other action taken or not taken pursuant to any term or condition of the plan or related trust agreement or of the articles of incorporation or bylaws of ConRail Equity Corporation.

Any directions described in clauses (i)(I), (ii), or (iii) shall be taken at the direction, or with the consent, of the Association or of the Secretary or his designate.

(B) Subparagraph (A) of this paragraph shall not be interpreted to relieve any person from any fiduciary or other responsibility, obligation or duty under any Federal or State law to take or not to take actions with respect to the plan in connection with [illegible] receiving contributions, (ii) exercising custodial responsibilities, (iii) determining eligibility to participate in the plan, (iv) calculating and determining and paying benefits, (v) processing and deciding claims, (vi) preparing and distributing plan information, benefit statements, returns and reports, (vii) maintaining plan records, (viii) appointing plan fiduciaries and other persons to advise or assist in plan administration and (ix) other than as provided in subparagraph (A), acquiring, holding or disposing of plan assets.

(C) For purposes of subparagraph (A) of this paragraph, the term "person" includes each of the following:

(i) the trustee or trustees of the plan, the Corporation and its subsidiaries, ConRail Equity Corporation, the Association, and any of their successsors and assigns;

(ii) each director, officer, employee and agent of the Corporation of any of its subsidiaries, of ConRail Equity Corporation, of the plan, of the Association or of any of their successors and assigns; and

(iii) each member of the Finance Committee and any of their employees and agents.

(D) Neither this paragraph nor paragraph (9) of this subsection shall be construed to grant immunity from any criminal law of the United States or of any State or the District of Columbia.

(9) The United States shall indemnify, defend, and hold harmless the persons described in paragraph (8)(C) of this subsection from and against any and all liabilities, claims, actions, judgments, amounts paid in settlement, and costs and expenses (including reasonable fees of accountants, experts, and attorneys) actually incurred in connection with the establishment, implementation, or operation of the plan or ConRail Equity Corporation or with any transaction which is required by or is appropriate to effectuate fully the provisions of this subsection, except as may arise in connection with the execution of a responsibility, obligation, or duty excluded from paragraph (8)(A) by paragraph (8)(B), if it is determined that such persons were acting in good faith. The indemnity provided in this paragraph shall be a full faith and credit obligation of the United States.

(10) All securities of the Corporation, all securities of any subsidiary of the Corporation and of ConRail Equity Corporation, and all interests in the employee stock ownership plan which are issued or transferred in connection with the employee stock ownership plan established by th Corporation pursuant to the requirements of this subsection shall be deemed for all purposes to have been issued subject to and authorized and approved pursuant to section 11301(b) of title 49 of the United States Code and any corresponding provision of any successor statute.

TITLE IV—TRANSFER OF FREIGHT SERVICE

INTEREST OF UNITED STATES

SEC. 401. (a) PLAN FOR SALE OF COMMON STOCK.—(1) As soon as practicable after the effective date of the Northeast Rail Service Act of 1981, the Secretary shall engage the services of an investment banking firm or similar financial institution, which firm or institution shall arrange for the sale of the interest of the United States in the common stock of the Corporation under this section.

(2) At any time after the effective date of the Northeast Rail Service Act of 1981 the Secretary may submit to the Congress a plan for the sale, in block or by public offering, of the interest of the United States in the common stock of the Corporation. Such plan shall—

(A) ensure continued rail service;

(B) promote competitive bidding for such common stock; and

(C) maximize the return to the United States on its investment.

(3) Any plan submitted under paragraph (2) shall be deemed approved at the end of the 60-calendar-day period of continuous session of the Congress beginning on the date the plan was submitted, unless during such period both Houses of Congress pass a concurrent resolution the substance of which states that the Congress does not favor such plan. The Secretary shall implement any plan deemed approved under this paragraph. For purposes of this subsection—

(A) continuity of session of the Congress is broken only by an adjournment sine die; and

(B) the days on which either House is not in session because of adjournment of more than 3 days to a day certain are excluded in the computation of the 60-day period.

FILED
AUG 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-156

In the Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS B. HOOVER, ET AL., PETITIONERS

v.

ELIZABETH HANFORD DOLE, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

WILLIAM KANTER
JOHN P. SCHNITKER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Secretary of Transportation exceeded her statutory authority by entering into a Memorandum of Intent to sell the United States' interest in Conrail on the express conditions that "appropriate arrangements" are made with respect to the interest of the Employee Stock Ownership Plan (ESOP) in Conrail and that Congress enact legislation authorizing the sale.

2. Whether the issue of the potential claims of the ESOP beneficiaries against the United States under the Tucker Act (28 U.S.C. 1491), in the event that (a) the necessary actions are taken to authorize the sale of Conrail contemplated by the Memorandum of Intent and (b) the sale has the result of under-compensating the beneficiaries, is ripe for adjudication at the present time.

3. Whether petitioners are entitled to appointment of an independent trustee to represent the interest of the ESOP in connection with the sale of Conrail contemplated by the Memorandum of Intent.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 7

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. *Gardner*, 387 U.S. 136 5

Cherokee Nation v. *Southern Kan. Ry.*, 135 U.S. 641 10

Dames & Moore v. *Regan*, 453 U.S. 654 ..... 5, 9, 10

Hodel v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 8

Kaufman v. *Societe Internationale*, 343 U.S. 156 12

Regional Rail Reorganization Act Cases, 419 U.S. 102 ..... 2, 5, 10

Constitution, statutes and rule:

U.S. Const. Amend. V 9

Northeast Rail Service Act of 1981, 45 U.S.C. 761-769c, 1101-1116 2

45 U.S.C. 1101(1) 2

45 U.S.C. 1105 4

Page

Constitution, statutes and rule—Continued:

Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, Tit. 11, §§ 1131-1168, 95 Stat. 643-687 2

Regional Rail Reorganization Act of 1973, 45 U.S.C. (& Supp. I) 701 *et seq.* 2

45 U.S.C. (& Supp. I) 711 2

45 U.S.C. 712 2

45 U.S.C. 719 4

45 U.S.C. 726(f) 3, 6

45 U.S.C. 726(f)(5)(A) 6

45 U.S.C. 726(f)(8)(A) 7, 11

45 U.S.C. 726(f)(8)(A)(i) 7, 11

45 U.S.C. 726(f)(8)(A)(ii) 7, 11

45 U.S.C. 726(f)(8)(B) 12

45 U.S.C. 761 2

45 U.S.C. 761(a)(1) 5, 7

45 U.S.C. 761(a)(2) 2, 5, 7

45 U.S.C. 763 2

Trading with the Enemy Act, 50 U.S.C. App. 5(b) 12

Tucker Act, 28 U.S.C. 1491 ..... 4, 9

Page

Constitution, statutes and rule—Continued:

United States Railway Association Amendments Act of 1978, Pub. L. No. 95-565, § 3, 92 Stat. 2397-2399 ..... 3, 6

Pub. L. No. 96-254, § 118(c), 94 Stat. 406 6

49 U.S.C. 301 8

Fed. R. Civ. P. 24 12

Miscellaneous:

H.R. Conf. Rep. 96-1041, 96th Cong., 2d Sess. (1980) 6

S. Rep. 99-98, 99th Cong., 1st Sess. (1985) 3, 4, 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-156

THOMAS B. HOOVER, ET AL., PETITIONERS

v.

ELIZABETH HANFORD DOLE, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Special Court (Pet. App. 1a-22a) is reported at 613 F. Supp. 374.

JURISDICTION

The judgment of the Special Court was entered on July 9, 1985. The petition for a writ of certiorari was filed on July 26, 1985. The jurisdiction of this Court is invoked under 45 U.S.C. 1105(b).

STATEMENT

Petitioners, present and former employees of Consolidated Rail Corporation (Conrail), seek to challenge a recent Memorandum of Intent between the Secretary of Transportation and Norfolk Southern Corporation for the sale of Conrail.

1. In 1981, Congress enacted the Northeast Rail Service Act of 1981 (NERSA).[1] Under NERSA, respondent Secretary of Transportation was authorized and directed to arrange for the sale to the private sector of the interest of the United States in the common stock of respondent Conrail. 45 U.S.C. 761, 763.[2] This congressional directive was the result of Conrail's failure to become "a self-sustaining railroad system" notwithstanding the infusion of "many billions of dollars" by Congress. 45 U.S.C. 1101(1).[3]

On February 8, 1985, the Secretary and respondent Norfolk Southern Corporation (Norfolk Southern) entered into a Memorandum of Intent (MOI) for the sale of the United States' interest in Conrail. Under the MOI, Norfolk Southern has agreed to purchase the United States' interest for approximately $1.2 billion, to surrender certain net operating loss and investment tax credit carryforwards of

---

[1]Subtitle E of Title 11 of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 1131-1168, 95 Stat. 643-687, codified in pertinent part at 45 U.S.C. 761-769c, 1101-1116.

[2]Under 45 U.S.C. 761(a)(2), the Secretary was authorized by Congress to submit a plan for the sale of the United States' interest in Conrail that would "ensure continued rail service; * * * promote competitive bidding for such common stock; and * * * maximize the return to the United States on its investment." The Secretary's efforts were also conditioned upon certain determinations concerning Conrail's profitability that were to be made by the Board of Directors of the United States Railway Association (USRA), the non-profit government corporation charged with oversight of Conrail. See 45 U.S.C. (& Supp. I) 711, 712, 763. As petitioners point out (Pet. 14-15), those determinations have all been favorable, thus authorizing the Secretary's efforts to sell Conrail.

[3]The financial difficulties of railroads and the rail transportation crisis of the early 1970s that led to enactment of the Regional Rail Reorganization Act of 1973 (the 3R Act), 45 U.S.C. (& Supp. I) 701 *et seq.*, under which Conrail was formed, have previously been reviewed by this Court in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 108-117 (1974).

Conrail, and to arrange to divest the combined Norfolk Southern/Conrail entity of certain rail tracks and facilities at closing to avoid possible antitrust concerns. See S. Rep. 99-98, 99th Cong., 1st Sess. 98, 105 (1985) (reprinting the Memorandum of Intent).

Of immediate relevance here, paragraph 2 of the MOI provides that "[a]t or prior to the Closing, [Norfolk Southern] or Conrail shall have made appropriate arrangements with respect to the employees of Conrail to accomplish * * * the acquisition by [Norfolk Southern] of such employees' 15% beneficial interest in Conrail." See S. Rep. 99-98, *supra,* at 98.[4] The MOI also includes an exhibit entitled "Summary of Buyer's Proposed Arrangements for Conrail Employees" that states that "Norfolk Southern will provide or cause to be provided cash or Norfolk Southern common stock in a total amount of $375 million, of which an amount determined to be the fair value of the assets and rights of the existing Conrail ESOP shall be contributed by Norfolk Southern to such ESOP." *Id.* at 122. Nothing in the

---

[4]This language refers to the employees' interest in an Employee Stock Ownership Program (ESOP) originally authorized by Congress under Section 3 of the United States Railway Association Amendments Act of 1978, Pub. L. No. 95-565, 92 Stat. 2397, codified at 45 U.S.C. 726(f). To implement this provision, Conrail established a wholly owned subsidiary, Conrail Equity Corporation (CEC), to which it transferred 15% of the total outstanding number of Conrail shares (4.412 million) and received in return an equal number of CEC shares. Under the ESOP, Conrail, on the last day of each plan year beginning December 31, 1980, and continuing for ten years, is to contribute 10% of these CEC shares (441,200) to the ESOP. That amount is then immediately allocated by the ESOP trustee to the account of Conrail employees who have qualified for that year as ESOP beneficiaries. To date, Conrail has contributed 50% of the available CEC preferred stock for the benefit of five designated classes of beneficiaries. In 1991, if all the ESOP requirements have been met, the CEC preferred stock will be redeemed for the Conrail common stock or other comparable property held by CEC. Thus, at the present time, the ESOP has only a beneficial interest in Conrail common stock and does not hold any such stock itself.

MOI specifies the arrangements that are to be made concerning the employees' beneficial interest in Conrail or provides a mechanism for valuing that interest.

The MOI represents "an agreement in principle with respect to the major terms and conditions * * * [for the sale to Norfolk Southern of] the interest of [the United States] in the Common Stock of Conrail." S. Rep. 99-98, *supra*, at 97. It does not itself constitute a sales agreement, but instead expressly contemplates further "efforts to negotiate, execute and deliver a definitive agreement for the purchase and sale of the interest of [the United States] in the Common Stock of Conrail" (*ibid.*). Moreover, the proposed sale is explicitly conditioned on the "approval of Congress and the enactment of legislation with respect to the transactions contemplated [in the MOI]" (*id.* at 97-98), including in particular legislation "providing a mechanism for definitively valuing the existing Conrail employee stock ownership plan ('ESOP')" (*id.* at 104).

2. Petitioners brought this action for declaratory and injunctive relief in the Special Court established under the Regional Rail Reorganization Act of 1973. See 45 U.S.C. 719, 1105. The court granted summary judgment to respondents and denied petitioners' application for a preliminary injunction (Pet. App. 1a-22a).

First, with respect to the question whether the ESOP beneficiaries would have a Tucker Act claim (28 U.S.C. 1491) against the United States in the event that the sale to Norfolk Southern is completed and does not afford adequate compensation to them, the Special Court held that this issue was not ripe for adjudication (Pet. App. 7a-14a). Noting that "the MOI is not [an] all encompassing 'definitive agreement' for the sale of Conrail" (*id.* at 11a n.10), the court explained that any eventual sale—including

specifically the compensation provided for the ESOP's interest—was entirely dependent on the enactment of future legislation that Congress had not yet developed (*id.* at 12a & n.11). The issue of the availability of a Tucker Act remedy was thus premature "since legislation that would need to be considered in this regard has not yet been enacted (*id.* at 12a-13a (footnote omitted)). Moreover, because "there is no governmental action now in effect" that could give rise to the Tucker Act issue (*id.* at 11a (footnote omitted)), the court held that this case is distinguishable from the situations in *Dames & Moore* v. *Regan,* 453 U.S. 654, 689 (1981), and the *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 126 (1974). Finally, the court pointed out that a delay in adjudicating the issue would only result in some "uncertainty" concerning the ultimate extent of petitioners' rights but would not impose a "hardship" on them (Pet. App. 13a-14a) under *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 153 (1967).

In addition, the Special Court rejected petitioners' argument that the Secretary had exceeded her statutory authority to arrange for "the sale of the interest of the United States in the common stock of [Conrail]" (45 U.S.C. 761(a)(1) and (2)) by negotiating for the sale of the ESOP's beneficial interest in the stock (Pet. App. 14a-17a). The court emphasized that "the MOI does not purport to sell the ESOP's interest or require conveyance of that interest at any price" (*id.* at 15a), and that "any sale of any Conrail stock to the Norfolk Southern is, by the terms of the MOI, expressly conditioned on the enactment of legislation ratifying the proposed sale" (*ibid.*). Thus, the Secretary has played only a "limited role * * * with regard to the ESOP stock" by "a) mak[ing] a commitment to sell the government's interests if 'appropriate arrangements' are made with regard to the ESOP and Congress expressly authorizes the proposed sale to Norfolk Southern; and b) recommend[ing]

that Congress enact legislation to provide for the sale" (*ibid.*). Given this requirement of ratifying legislation, and in view of the Secretary's broad responsibility to oversee transportation matters and make recommendations to Congress (see *id.* at 17a), the court concluded that "the Secretary's limited foray into matters touching on the ESOP's interest [did not] exceed[ ] the Secretary's authority" (*id.* at 16a).[5]

The Special Court also held that petitioners' claim of a conflict of interest on the part of the Secretary did not entitle them to appointment of an independent trustee to represent the interest of the ESOP in any proceeding concerning the sale of Conrail (Pet. App. 18a-22a). Relying on 45 U.S.C. 726(f),[6] the court concluded that "the statutory

---

[5]The court specifically did not decide "whether the Secretary would exceed her statutory authority by conveying the ESOP's interests in Conrail in the absence of legislation addressing this issue," noting that petitioners "concede that th[is] * * * issue is not yet ripe" (Pet. App. 17a-18a n.14).

[6]The legislation providing for the creation of the Conrail ESOP required Conrail to submit a written plan to Congress within one year of enactment to exempt those associated with the ESOP from "any fiduciary duty, responsibility or liability for the acquisition of, investment in, or retention of any security or interest therein of [Conrail] or for any other transaction contemplated by this subsection." United States Railway Association Amendments Act of 1978, Pub. L. No. 95-565, § 3, 92 Stat. 2399, codified at 45 U.S.C. 726(f)(5)(A). In 1980, Congress passed such a limitation of liability by adding Subsection (8)(A) to Section 216(f) of the 3R Act. See Pub. L. No. 96-254, § 118(c), 94 Stat. 406; see also H.R. Conf. Rep. 96-1041, 96th Cong., 2d Sess. 30-32 (1980). In pertinent part, that Section provides that no ESOP manager

> shall have or be subject to any fiduciary responsibility, obligation, or duty, nor shall any such person be subject to civil liability, under any Federal or State law, as a fiduciary or otherwise—
>
> > (i) in connection with the employee stock ownership plan and related trust established by [Conrail] pursuant to the requirements of this subsection or with ConRail Equity Corporation * * * on account of any reorganization or restructuring

scheme suggests that Congress foresaw that officials charged with responsibility for the ESOP might face claims of conflict of interest in connection with a sale of Conrail, such as the claims raised in this action, * * * [and] deliberately chose not to make these officials accountable to Conrail ESOP beneficiaries for any breach of fiduciary duties 'under any federal or state law' " (Pet. App. 20a-21a (footnote omitted)). In light of this statutory scheme, to accept petitioners' argument for an independent trustee "would go beyond construction or interpretation and require that this [c]ourt completely rewrite statutes enacted by Congress" (*id.* at 21a-22a (footnote omitted)).

ARGUMENT

The decision of the Special Court is correct and does not conflict with any decision of this Court. Accordingly, further review is not warranted.

1. Petitioners contend (Pet. 22-27) that by including in the MOI a provision concerning the sale of the ESOP's beneficial interest in Conrail, the Secretary exceeded her statutory authority to arrange and submit a plan to Congress for the sale "of the interest of the United States in the common stock of [Conrail]." 45 U.S.C. 761(a)(1) and (2). However, as the Special Court explained, "the MOI does not purport to sell the ESOP's interest or require conveyance of that interest at any price" (Pet. App. 15a; see also *id.*

> of [Conrail], its successors or assigns, or their assets or capital structure * * *;
>
> (ii) for or in connection with * * * the disposition of any * * * security [of Conrail or ConRail Equity Corporation] to the extent that such disposition is made in connection with a reorganization or restructuring of [Conrail], its successors and assigns, or their assets or capital structure, as directed or approved by * * * the United States * * *.

45 U.S.C. 726(f)(8)(A), (i), and (ii); Pet. App. 21a.

at 11a n.10). Rather, the MOI merely reflects "a commitment to sell the government's interests if 'appropriate arrangements' are made with regard to the ESOP" (*id.* at 15a)—arrangements that are not specified in the MOI but are left open for future determination. Moreover, the MOI expressly requires that Congress, which originally authorized the establishment of the ESOP, approve the proposed sale by enacting legislation that provides, inter alia, "a mechanism for definitively valuing the [ESOP]" (S. Rep. 99-98, *supra,* at 104).

Especially in light of the Secretary's broad responsibility to make recommendations to Congress on transportation matters,[7] the MOI's limited and provisional reference to the ESOP, which is of no effect unless and until ratified by Act of Congress, is not beyond the Secretary's authority. Petitioners' real complaint is directed to the manner in which *Congress* may deal with the ESOP's interest if it enacts *future* legislation authorizing the proposed sale.[8] Their arguments on this matter should be addressed to the legislature, not to the courts.

2. Expressing concern that the proposed sale to Norfolk Southern may not adequately compensate the ESOP for its beneficial interest in Conrail, petitioners seek (Pet. 27-34) a

---

[7]See 49 U.S.C. 301:

> The Secretary of Transportation shall—
>
> (1) under the direction of the President, exercise leadership in transportation matters * * *;
>
> (2) provide leadership in the development of transportation policies and programs, and make recommendations to the President and Congress for their consideration and implementation[.]

[8]Indeed, to the extent that petitioners' objection concerns treatment of the ESOP beneficiaries by Congress in legislation that has not yet been enacted, it is not justiciable in this suit. Cf. *Hodel* v. *Virginia Surface Mining & Reclamation Association,* 452 U.S. 264, 294-295 (1981).

determination at this time that they will have a remedy against the United States pursuant to the Tucker Act, 28 U.S.C. 1491, in the event of such under-compensation. The Special Court correctly held that this issue is not ripe for adjudication. Given that the MOI is merely an initial step in the process of negotiation and sale and that Congress has not yet adopted legislation to approve the proposed transaction or fix the mechanism for valuing the ESOP, petitioners' claim is plainly premature.[9]

Nor, contrary to petitioners' assertion, is this case analogous to *Dames & Moore* v. *Regan,* 453 U.S. 654 (1981),[10]

---

[9]Congress has not even begun to consider the mechanism for valuation of the ESOP's interest or the nature of any legislative protections it may wish to afford to the ESOP beneficiaries. Indeed, in the committee report accompanying the bill to approve the proposed sale to Norfolk Southern, the Senate Committee on Commerce, Science and Transportation noted that the legislation does not contain a specific mechanism for valuing the ESOP and therefore "it will be necessary to offer an amendment containing such a mechanism when [the bill] is considered by the full Senate." S. Rep. 99-98, *supra,* at 41. The Senate report also states that "[r]egardless of the valuation mechanism ultimately selected, the Committee intends to assure that all ESOP participants receive just compensation for their interests and that this compensation is available as soon as feasible after the date of enactment" (*ibid.*). As of this date, the full Senate has not yet taken up the bill, nor has the responsible House committee begun to consider legislation to approve the proposed sale.

[10]In *Dames & Moore* v. *Regan,* this Court sustained a presidential Executive Order implementing the agreement between Iran and the United States for freeing American hostages held in Iran and releasing certain Iranian assets frozen in the United States. That Executive Order "suspended" all claims by United States nationals pending in American courts against Iran and provided for the presentation of such claims to an Iranian-United States Claims Tribunal. 453 U.S. at 666. The petitioner in that case had obtained a judgment against Iranian defendants and had sought relief both by prejudgment attachment and execution on the judgment against the defendants. In upholding the Executive Order "suspending" petitioner's claim, this Court held that, although the issue of whether the suspension would constitute a taking of property in violation of the Fifth Amendment was not yet ripe for review,

and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).[11] In contrast to those cases, at this point there has been no final and binding governmental action, like the suspension order in *Dames & Moore* or the compelled continuation of unprofitable service in *Regional Rail*, that could have an adverse effect on petitioners' legal rights. In the absence of such governmental action that could give rise to a Tucker Act remedy, the issue is not ripe for resolution by the courts. And nothing in this Court's decisions establishes the expansive proposition, on which petitioners rest (Pet. 33), that "if a course of events may lead to a taking of private property, the right to compensation is presently

---

"this contention, and the possibility that the President's actions [under the Executive Order] may effect a taking of petitioner's property, make ripe for adjudication the question whether petitioner will have a remedy at law in the Court of Claims under the Tucker Act." 453 U.S. at 689, citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125 (1974). Since the government conceded that there was no statutory bar to petitioner's taking claim before the Court of Claims, this Court stated that it saw "no jurisdictional obstacle to an appropriate action * * * under the Tucker Act." 453 U.S. at 689-690.

[11]In the *Regional Rail Reorganization Act Cases*, this Court held that the Tucker Act was available to provide a remedy for a "taking" arising from the "erosion" in value of the assets of the Penn Central estate as a result of the statutorily-required continuation of rail operations pending implementation of the "final system plan" (which resulted in the formation of Conrail) under the 3R Act. 419 U.S. at 125-136. See note 3, *supra*. In so ruling, this Court recognized that the "compelled continued rail operations under * * * conditions [of further losses] * * * may accelerate erosion of the interests of plaintiffs" and therefore "failure to decide the availability of the Tucker Act would raise the distinct possibility that * * * plaintiffs would suffer an 'erosion taking' without adequate assurance that compensation will ever be provided." Such a result, the Court concluded, would violate the rule that "there must be at the time of taking 'reasonable, certain and adequate provision for obtaining compensation.' " 419 U.S. at 124-125 (footnote omitted) (quoting *Cherokee Nation* v. *Southern Kan. Ry.*, 135 U.S. 641, 659 (1890)).

justiciable." Petitioners' attempt to litigate over "the potential adoption of an act of Congress" (Pet. 33-34) is accordingly not justiciable.[12]

3. Petitioners lastly contend (Pet. 34-47) that the Secretary has a conflict of interest with respect to the Conrail ESOP and therefore that the Special Court should have appointed an independent representative to protect the interest of the ESOP beneficiaries. As petitioners concede (Pet. 42), however, this argument is premised on their assertion that the Secretary in negotiating the MOI "has arrogated to herself unauthorized authority over the ESOP stock." For the reasons discussed above, the Secretary has not exercised such "unauthorized authority" with respect to the ESOP, and thus the basis of petitioners' argument is incorrect.

In any event, as petitioners acknowledge (Pet. 34), Congress, in enacting the statute under which the ESOP was established, explicitly exempted "any * * * person" associated with management of the ESOP from "any fiduciary responsibility, obligation, or duty * * * in connection with the employee stock ownership plan * * * on account of any reorganization or restructuring of [Conrail] * * * [or] disposition of any [Conrail] security to the extent that such disposition is made in connection with a reorganization or restructuring of [Conrail] * * * as directed or approved by * * * the United States." 45 U.S.C. 726(f)(8)(A), (i), and (ii). This language is clearly controlling here, as the Special

---

[12]If, instead of the MOI, a bill had been introduced in Congress to authorize the sale of Conrail to Norfolk Southern, that action would not create a justiciable controversy over the potential right of the ESOP beneficiaries to a Tucker Act claim against the United States. In substance, the MOI negotiated by the Secretary and proposed to Congress is no different; like the introduction of a bill, it does not present a ripe issue.

Court recognized (Pet. App. 20a-21a), and petitioners' attempted construction to the contrary is unavailing; "[t]o conclude otherwise would go beyond construction or interpretation and require that th[e] [c]ourt completely rewrite statutes enacted by Congress" (*id.* at 21a-22a (footnote omitted)).[13] Nor is there any basis for petitioners' sweeping assertion (Pet. 36), notwithstanding this provision, of an "inherent equitable power [in] any American court to correct manifest injustice."[14]

---

[13]Petitioners' assertion (Pet. 41 & n.2) that the Special Court's ruling "removed all power from any Court" to control the actions of the ESOP managers (including thefts of cash from the ESOP) is patently incorrect. Congress, in absolving the ESOP managers from potential fiduciary liability in connection with the future restructuring or reorganization of Conrail, explicitly did not relieve such persons from fiduciary liability in connection with the normal custodial responsibilities associated with administration and management of the ESOP. See 45 U.S.C. 726(f)(8)(B).

[14]Petitioners also attempt (Pet. 43-46) to analogize this case to *Kaufman* v. *Societe Internationale*, 343 U.S. 156 (1952). *Kaufman* is clearly distinguishable, however. That case, arising under the Trading with the Enemy Act, 50 U.S.C. App. 5(b), involved the government's seizure of assets of a neutral corporation controlled by enemy aliens. The questions presented were whether the proportionate rights of non-enemy stockholders were to be protected and whether those stockholders should be allowed to intervene in the lawsuit pursuant to Fed. R. Civ. P. 24. In this case, by contrast, there has been no seizure or other taking of the ESOP's beneficial interest, and the Court's decision in *Kaufman* in no way suggests that the various rail statutes entitle petitioners to the appointment of an independent representative.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

WILLIAM KANTER
JOHN P. SCHNITKER
Attorneys

SEPTEMBER 1985

DOJ-1985-09